1950
*Oct. 4, 5, 6, 10, 11
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*Feb. 6

THE SHIP *"SPARROWS POINT"* (DEFENDANT) ..... APPELLANT;

AND

GREATER VANCOUVER WATER DISTRICT (PLAINTIFF) ..... RESPONDENT-APPELLANT

AND

NATIONAL HARBOURS BOARD (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT.

Shipping—Damage to water mains caused by ship's anchor—Whether ship failed to comply with regulations governing passage of ships under bridges at Vancouver—Whether ship remained "at safe distance" —Whether operators of bridge at fault—Jurisdiction of Exchequer Court in claim against bridge.

The regulations governing the passage of ships under the Second Narrows bridge at Vancouver, B.C., provided that every vessel, desiring the lift span of the bridge to be raised, should give a signal to be repeated until acknowledged by a red light and remain at a safe distance from the bridge until a green light, indicating that the span had been raised, had replaced the red.

The ship *"Sparrows Point"*, after having received the acknowledgment light, proceeded to a point beyond which, still not having seen the green light, she could not safely go on, and thereupon dropped her anchor damaging the respondent Water District's water mains laid there under statutory authority and marked on the navigation charts. The trial judge found that the ship had been negligent and exonerated the operators of the bridge. The ship appealed to this Court against this finding of negligence and the Water District appealed against the exoneration of the Harbours Board.

Held: That the ship, in disregard of her duty to the Water District mains, committed a negligent act by approaching so close to the bridge without having seen the green signal, thus incurring the risk of having to anchor in the area occupied by the mains.

Held (Locke J. dissenting), that the operators of the bridge were also at fault, in neglecting to switch off the red light and switch on the green after the span had been raised; but (Rand and Locke JJ. contra) the easement provision in the agreement under which the mains were laid precluded the Water District from claiming against the Harbours Board for the damage.

Held (Locke J. expressing no opinion), that under the *Admiralty Act* (S. of C. 1934, c. 31) the Exchequer Court had jurisdiction to deal with the claim of the Water District against the Harbours Board.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Kellock and Locke JJ.

Per Locke J. (dissenting in part): The trial judge having heard the evidence of the two operators of the span his finding that the green light was displayed as sworn to by them should not be disturbed, and therefore the appeal of the respondent, Water District, should be dismissed as against the National Harbours Board. (*Arpin* v. *The Queen* 14 Can. S.C.R. 736, *Granger* v. *Brydon-Jack* 58 Can. S.C.R. 491, *Powell* v. *Streatham* [1935] A.C. 243 and *Watt* v. *Thomas* [1947] 1 A.E.R. 583 referred to).

APPEALS from the judgment of the Exchequer Court of Canada, British Columbia Admiralty District (1).

Alfred Bull K.C. and *D. S. Montgomery* for the appellant.

Douglas McK. Brown K.C. and *John J. Urie* for Greater Vancouver Water District.

F. D. Smith K.C. and *J. I. Bird* for National Harbours Board.

The judgment of the Chief Justice and of Taschereau and Kellock JJ. was delivered by

KELLOCK J.:—The ship appeals on the ground that there was no negligence on the part of anyone for whom it is chargeable, while the Water District appeals against the finding of the trial judge (1) in exoneration of the Harbours Board.

As to the ship, it is clear on the evidence that both the pilot and the captain were aware of the existence and location of the mains here in question, and that they were also aware of the position of the ship at all relevant times.

The ship had blown for the bridge when it was opposite Berry Point, one and one-half miles east of the bridge. Almost immediately thereafter, the red light on the bridge appeared. Both the pilot and the captain gave evidence that in their experience the invariable practice was for the red light to be followed "shortly after" by the green, indicating that the span was up. On the occasion in question, however, according to the evidence of those on the ship, the green light did not appear as formerly, and for that reason the whistle signal was repeated a number of times, the ship meanwhile proceeding slowly along the channel which was progressively becoming narrower and

(1) [1950] Ex. C.R. 279.

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more dangerous for a ship of that size, should she have to anchor. The mains occupy some 550 feet between a point 1,100 feet east and 1,650 feet east of the bridge.

Both the captain and the pilot say that the visibility was good. However, those in charge of the ship knew, or should have known, that if the green signal continued to be delayed in its appearance, the time would come when the ship could safely proceed no farther. In my view, it was negligent for the ship to proceed to the point it did before stopping or casting its anchor. In so proceeding, the ship was voluntarily incurring the risk of having to anchor in the area occupied by the mains. There was no necessity for such a course. She could and should have anchored to the east. I think the language of Willes J. in the *Sub-Marine Telegraph Company* v. *Dickson* (1), is applicable:

> It is the duty of the persons navigating so to exercise their rights as to do no damage to the property of others . . . No one is justified in wilfully or by culpable negligence injuring property of another, whether above or under water.

With respect to the respondent, National Harbours Board, the learned trial judge accepted the evidence of the bridge operators to the effect that the span over the channel was raised immediately after the showing of the red light, but that fog existing at the upper level shrouded the light to such an extent that it was not visible to those navigating the ship. He also found that those on board the ship, including the pilot, were mistaken when they testified that they continued to see the red light until after the anchor had been dropped.

The learned trial judge did not base his finding as to the green light on credibility. On the contrary, his finding that the pilot was mistaken in testifying that he continued to see the red light until it was changed to green, was on the ground that he was *honestly* mistaken. The learned judge says that the pilot was undoubtedly a man of very great experience and that he gave his evidence in such a satisfactory and seamanlike fashion as to win his admiration. He said he felt that the witness was perfectly

(1) (1864) 15 C.B. (N.S.) 759 at 779.

straightforward and that from his career he knew more about navigation under the Second Narrows Bridge than anybody else in the world.

I think it must be taken that, so far as honesty is concerned, the learned trial judge had a similar view about the other witnesses on the ship who testified as to the lights on the bridge, as he puts his conclusion with regard to their evidence on the same basis as that of the pilot, namely, mistake. The reason he gives for accepting the evidence of the operators of the bridge as to the fog at the upper level of the bridge and as to the green light having replaced the red, is because he saw "no ground why I should doubt the accuracy of the evidence of the bridge operators." In these circumstances, an appellate court is in as good a position as the trial judge to draw the proper inference from the evidence. As put by Viscount Simon in *Watt* v. *Thomas* (1):

> It not infrequently happens that a preference for A's evidence over the contrasted evidence of B is due to inferences from other conclusions reached in the judge's mind rather than from an unfavourable view of B's veracity as such. In such cases it is legitimate for an appellate tribunal to examine the grounds of these other conclusions and the inferences drawn from them, if the materials admit of this, and, if the appellate tribunal is convinced that these inferences are erroneous and that the rejection of B's evidence was due to the error, it will be justified in taking a different view of the value of B's evidence.

Lord Thankerton said at p. 587:

> The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

In the case at bar, there is no controversy about the fact that the red light on the bridge was switched on at approximately 0414, and that it was seen by those on board the ship. This is expressly so found by the learned trial judge who says:

> After the *"Sparrows Point"* whistled, the bridge showed its red light so that the ship knew her signal had been heard.

It took approximately three minutes for the bridge span to be raised, and the entry in the bridge log indicates that the span was raised at 0417. The learned trial judge does not say when those on board the ship became mistaken,

(1) [1947] 1 All. E.R. 582 at 584.

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but on the evidence and his finding it is clear that they saw the red light for at least three minutes after it first appeared. Presumably, in the view of the learned trial judge, the mistake arose when the bridge with the light ascended into the fog which the bridge operators say existed at the upper level, but the learned judge does not indicate how the mistake could have arisen. There was no other red light with which that on the bridge could have been confused, and this is not suggested by the learned judge.

Counsel for the Harbours Board very properly makes much of some evidence given by the Chief Officer of the ship to the effect that he saw the red light before the ship whistled initially. This evidence is so clearly erroneous that I do not think it is of any value one way or the other in the determination of the matters in issue. Clearly the red light did not go on except in answer to the ship's signal, and the witness's memory as to the time he first observed it is at fault.

Accordingly, just how those on board the ship could have been mistaken and honestly mistaken in continuing to see the red light is left unexplained. The ship was continuously getting closer to the bridge and the view of those on board would continue to improve, and the mistake, if mistake there was, must have lasted for some ten minutes, from 0417 when the span went up, until 0427 after the ship had anchored. The trial judge finds that it was the sight of the green light which caused the ship to weigh anchor and proceed through the bridge even before the operators of the bridge say they saw the ship. In these circumstances and on these findings, I am unable to see any more ground for doubting the accuracy of the evidence of those on board the ship who testified to seeing the red light than for doubting the accuracy of the evidence of the bridge operators. In fact, acceptance of the evidence of the latter on the ground upon which it is put presents the tribunal of fact with the much greater difficulty of making some explanation as to how those on board the ship could have been mistaken in thinking that the red light, which they undoubtedly saw for the first three minutes after its appearance, continued within their vision,

the forward movement of the ship continually narrowing the distance between them and the point where the light was situated.

Although not of itself sufficient, it is of considerable significance in the light of the considerations mentioned above, that the conduct of the ship is entirely consistent with the evidence of those on board. When the green light did not appear within the customary period, the ship continued to blow its whistle to indicate that fact to the bridge operators, and the ship continued to approach the bridge, a fact which would be patent to them. As to the evidence of the bridge operators, that they advised the ship over the loud-speaker that the span had been raised, the witnesses on board the ship, honest witnesses according to the learned trial judge, say that they heard all that was said except the statement that the span had been raised. No motive is alleged or can be imagined why the ship would not have proceeded through the bridge if it had been apprised of the fact that the way was clear. No one suggests that there was any fog between the piers where the ship had to pass, nor anywhere except at the upper level, some 120 feet above the water. The bridge operators themselves admit that if those on board the ship could hear the loud-speaker at all, they could hear everything that was said, and it is significant that two independent witnesses who lived on the south bank of the channel, one 400 yards and the other 500 yards east of the bridge, heard what those on board the ship heard, and nothing else.

In these circumstances, I think there is more ground for doubting the accuracy of the evidence of the bridge operators than that of those on board the ship. I think the conclusion must be that the mistake was on the part of the bridge operators in neglecting to switch off the red light and switch on the green after the span was raised, and that this omission was realized by them only when they realized that the ship was not going through but was anchoring. In my opinion, there was a duty on the Board not to do or omit to do anything which might unnecessarily result in damage to the water mains. In the present instance, I think there was a breach of that duty.

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The question was raised during the argument as to the jurisdiction of the Admiralty Court to deal with the claim of the Water District against the Harbours Board. It is clear, I think, that the court has no jurisdiction beyond that conferred by the statute; c. 31 of the statutes of 1934; *Bow McLachlan and Co.* v. *The Ship "Camosun"* (1). The statute has been changed since that decision, but the principle is still applicable. The answer to the question raised depends upon the meaning of the words "damage by any ship" in s. 22(1) (iv) of Schedule A to the statute of 1934, which reproduces s. 22 of the *Supreme Court of Judicature Consolidation Act* (1925) c. 49, the language of which is "any claim for damage done by a ship." There have been a number of decisions since the enactment of the original statute of 1861, 24 Vic. c. 10, s. 7.

In the *"Uhla"* (2), and in the *"Excelsior"* (3), jurisdiction was exercised in the case of damage done by a ship to a dock, and in *Mayor of Colchester* v. *Brooke* (4), jurisdiction was exercised in the case of damage to oyster beds.

In the case of the *"Bien"* (5), the plaintiff, lessee of an oyster bed, sued the conservators of the River Medway and the owner of a ship for damage sustained to an oyster bed caused by a ship when acting under orders of a harbour master. That case was, of course, decided after the Judicature Acts when the jurisdiction of the Admiralty Division was no longer limited to that formerly exercised by the Court of Admiralty. The circumstances in question in the present proceedings are analogous. If the claim against the Harbours Board cannot be entertained in the Admiralty Court, the result is that the Water District ought to have brought two actions, the one on the Admiralty side of the Exchequer Court against the ship, and the other elsewhere.

In my opinion, the statute, which prima facie confers jurisdiction upon the Admiralty Court in a case of this kind, should be construed so as to affirm the jurisdiction, at least in a case where the ship is a party. There is no authority to the contrary to which we have been referred

(1) [1909] A.C. 597.
(2) (1867) Asp. M.C. 148.
(3) (1868) L.R. 2 A. & E. 268.
(4) (1845) 7 Q.B. 339.
(5) (1911) P. 40.

or which I have been able to find, and every consideration of convenience requires a construction in favour of the existence of such a jurisdiction.

In the *"Zeta"* (1), Lord Herschell, in referring to s. 7 of the Act of 1861, said at p. 478:

> It is enough to say that the proposition that the Act of 1861 applies to damage done by a ship to persons and things other than ships has been well established by many authorities, the correctness of which I see no reason to question.

With respect to the earlier Act of 1840 (damage to a ship), he said at p. 485:

> Even if its operation, when the words are construed according to their natural meaning, be to enlarge the jurisdiction of the Court of Admiralty in the case of damage received by a ship upon the high seas, there is nothing in the frame of the enactment to indicate that this was not the intention of the Legislature, though, no doubt, its chief object may have been to extend the jurisdiction which existed in the case of damage received by ships upon the high seas to damage received in the body of a county. It does not provide in terms for an extension, to cases where the occurrence is within the body of the county, of the jurisdiction which would exist if the occurrence had been upon the high seas; but it gives jurisdiction in certain cases 'whether the ship may have been within the body of a county or upon the high seas'.

It is true that it has been held that s. 7 of the original Act does not extend to permit a pilot to be sued in the Admiralty Court, but these decisions stem from the judgment of Dr. Lushington in the *"Urania"* (2), in which no reasons were given for such a construction. In the later case of the *"Alexandria"* (3), Sir Robert Philimore, while deeming himself bound by the earlier decision, said that had the question been *res integra,* he would have considered an action against a pilot as within the statute. These decisions were followed by the Court of Appeal in *The Queen* v. *The Judge of the City of London Court* (4). This decision was in turn approved by Lord Macnaghten in the *"Zeta"* (5), but the majority of their Lordships in that case expressed no opinion on the point, Lord Herschell stating at p. 486 that

> In that and the other cases relating to suits instituted in respect of the negligence of pilots, stress was laid on certain considerations which do not touch the case with which your Lordships have to deal.

The considerations referred to, as stated by the Master of the Rolls (4) in (1892) 1 Q.B. at p. 298, are that a pilot,

(1) [1893] A.C. 468.
(2) (1861) 10 W.R. 97.
(3) (1872) L.R. 3 A. & E. 574.
(4) (1892) L.R. 1 Q.B. 273.
(5) [1893] A.C. 468.

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sued in Admiralty in respect of a collision which has occurred through his negligence, would be deprived of the common law defence of contributory negligence, and that originally the pilot's liability in the Admiralty Court was unlimited although the owners of the ship would have had a limited liability only.

In such a case as the present, these considerations do not apply. As to the effect of a finding of contributory negligence, it was pointed out by Lord Herschell L.C. in the *"Zeta"* that the rule as to division of damages in Admiralty applied only in the case of collisions between ships. In the present case, if the Harbours Board were sued in the ordinary courts, it would seem that contributory negligence of the plaintiff would be a defence. Under its statute, 1 Ed. VIII c. 42, s. 3(2), the Board is a corporation, and for all purposes of the Act, the agent of His Majesty. By subsection (3) it is given capacity to contract and to sue and be sued in its own name. By s. 10, all property acquired or held by the Board shall be vested in His Majesty. I think, in the presence of these provisions, the existence of a cause of action in tort is to be governed by the same principles as apply in the case of a claim in tort against the Crown. A bridge vested in the Crown and operated by an agent of the Crown is a "public work" within the meaning of s. 19(*c*) of the Exchequer Court Act and as a cause of action for negligence of a servant of the Crown on a public work is and was liable to be defeated on the ground of contributory negligence, long before the passing in 1925 of the *British Columbia Contributory Negligence Act,* the result would be the same in the provincial courts in such a case as the present. The other consideration as to the limits of liability of a pilot has no application.

On the other hand, all claims arising out of the damage occasioned by the ship should be disposed of in one action so as to avoid the scandal of possible different results if more than one action were tried separately. I therefore think that the statute is to be construed as clothing the Exchequer Court on its Admiralty side with the necessary jurisdiction.

In my opinion, however, the claim of the Water District with respect to the damage to all the mains other than No. 6 is excluded by the provisions of P.C. 319:

1. The Corporation agrees to assume all responsibility for the laying, construction and maintenance of the water mains or for any damage which may be done to the water mains by vessels fouling them, or for any damage which may be done by the said water mains to vessels, provided that nothing herein shall deprive the Corporation of any legal recourse it may have against any person or persons damaging the said water mains wilfully or through negligence.

2. It is distinctly understood and agreed that nothing herein contained shall operate to render His Majesty or his officers, servants or workmen liable directly or indirectly for damage which may be done from any cause to the said water mains.

In the first place, it is to be pointed out that the Crown is the owner of the bed of the harbour, and that, by the order-in-council the right to lay and maintain the mains was granted to the predecessor in title of the Water District. Accordingly, the latter could suffer damage to the mains by trespass, whether wilful or not, as well as by negligence; the *"Swift"* (1). It is plain from the provisions of paragraph 1 above, that damage from all three causes was in the contemplation of the draftsmen. Under that paragraph, taken by itself, the grantee is to assume all responsibility for damage to the mains "by vessels fouling them," but by force of the proviso, recourse against "any" person or persons is preserved or provided for in the case of wilful or negligent damage. Any person or persons would include servants of the Crown.

I think the intention of paragraph 2 is to provide that negligence of Crown servants is not to be taken as excepted out of the broad language of paragraph 1 by reason of anything in the proviso. Put another way, the proviso does operate to render Crown servants liable, as it excepts them from the broad exemption granted by the earlier language of the paragraph. To read paragraph 2 otherwise in relation to damage to the mains "by vessels fouling them" would, in my opinion, render the paragraph nugatory. I do not think it should be so read, and giving it the operation which I think should be given, the effect is to preclude the Water District from claiming against the Crown in respect of the damage to any of the mains other than No. 6. This main was laid prior to the license

(1) [1901] P. 168 at 171.

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granted by P.C. 319, and is not affected by it. It is not shown under what authority this main was laid, but that it was rightfully there is recognized by the order-in-council itself, as it is shown on the plan attached thereto. The easement agreement, to which reference is made, does not apply to this main.

I think, therefore, that the Water District is entitled to recover against the Harbours Board in respect of the damage to main No. 6, and to that extent its appeal should be allowed against the Board with costs throughout. The appeal of the ship should be dismissed with costs.

RAND J.:—The determinative question in the facts of this controversy is whether or not the red light on the bridge was seen by those on board the vessel, as they assert, up to the time of anchoring.

There is no dispute that the sole purpose of the vessel was to pass through the bridge in safety and with the least delay; that the signal for the draw had been given at 4:14 a.m. at 1½ miles from the bridge and had been at once answered by the red light; and that the vessel was then seen by those on the bridge and the bridge light from the vessel: the conflict begins as from the hour 4:17. The bridge tender asserts that at that moment the draw had been raised to a height of 120 feet, the red light switched off and the green on; while from the vessel it is insisted that the red light continued until about a minute after the anchor dropped. That action was a serious step and was taken only in what was considered to be an emergency; and there can be no doubt that the pilot and ship's officers did not, up to that time, see the green light.

Then followed these significant occurrences: within approximately a minute of anchoring, the noise of which was clearly heard on the drawbridge, the green light appeared, the anchor was at once raised, and the vessel proceeded to pass through the draw without further incident. She was said not to have been seen from the bridge at anchor, and to have been first observed about 1,000 feet from the bridge, approximately 500 feet west from the anchorage, as emerging from fog. The explanation of the

one light being seen and the other not may be that the light on the bridge is more powerful than that on the vessel.

Of those on board whose testimony is to be considered, there was, first, the pilot. This man, MacKay, is one of the senior pilots of Vancouver, who was said by Smith J. (1) to know the harbour and its navigation probably better than anyone else. His veracity is unquestioned; but the trial judge, accepting the statements of the men operating the draw, finds that the pilot must have been mistaken in thinking he saw the red light, either it seems to be, as to its colour or its identity. On the ship's bridge with the pilot were the captain, the third officer and the quartermaster: all gave evidence to the same effect as the pilot. The first officer was stationed on the fo'c's'le and although his primary duty was in relation to the anchor, he likewise saw the red light up to the moment of anchoring. His statement that he saw it before the first signal of approach, admittedly erroneous, was probably an inadvertence.

In this conflict, I reconstruct the situation as follows: the signal for the draw was made at 4:14, it was at once answered by the red light, which was seen by the vessel, and the draw raised as claimed; the tender overlooked changing from the red to the green signal, a double operation carried out by separate switches; this condition continued until he and his assistant were startled to hear the anchor chain running out, an occurrence unusual so near the bridge and one which would arouse them to a realization that something was wrong; checking their own operations, they discovered the red light still burning and swiftly made the change seen by those on the vessel. It may be, as they say, that there was some fog or mist conceivably generated at the higher level by the air of the cabin and that they had lost sight of the ship; that may explain the use of the megaphone, for otherwise its use would appear purposeless. They may have thought, also, that the fog or mist extended to the water, which it did not; but it was not any clearing of fog that brought about the vessel's movement from anchorage.

(1) [1950] Ex. C.R. 279.

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The unchallenged matters exclude, I think, the possibility that the officers of the vessel, including the pilot, bent on their navigation, could have been mistaken in the continued perception of the red light, after first seeing it appear at the moment when admittedly it did appear; if the trial judge means, mistaken as to having seen it at all, a fortiori, I would be forced to disagree with him: the fact that the ship's light was seen from the drawbridge would seem to me to be conclusive against such a view. The suggestion that it might have been a light either on the north or south shore beyond the bridge was only faintly pressed, and is ruled out by the evidence of the pilot: certain lights on what was called the Navy Dock along the north shore had in fact been seen by him, and those on the south shore would be outside his line of vision. What seems to me to be the overwhelming probability is that the controlling circumstance was not a mistake in vision by the pilot, but the oversight of the persons on the bridge to switch from red to green.

On that view of the navigating facts, what is the responsibility of either or both of the defendants for the damage done? The ship must be charged with knowledge that the pipes were rightfully on the harbour bed; and the Water District was not negligent in exercising the license by failing to place them in trenches. The mode adopted is not in itself unreasonable; it is indicated on the plans approved by the orders made; and, for about forty years that condition of some of them has been known by all concerned. The notation on the navigation chart used by the vessel is a warning of their presence of which the pilot and captain were aware: and the Commission had full knowledge of the installations.

By the regulations of the Commission relating to signals, the green light is necessary before the bridge can be approached beyond "a safe distance," and until that signal is seen a vessel proceeds in contemplation not only of risks to the bridge and navigation generally but also to property which the incidents of navigation may give rise to. The dangers inherent in an uncertain right of navigating the narrow channel approaching the bridge should have been apparent; and to allow the vessel to hazard

them on the chance that passage would be cleared before emergency measures should become necessary was a disregard of the duty owing to the Water District.

On the other hand, the movement of the vessel was under the actual control not only of the pilot and the ship's officers, but also of the bridge tender. The recognition signal of the approach and the continued absence of a stand-off warning left it to the vessel to proceed cautiously while the draw was being made ready. The single red light represented normal conditions to prevail, that the machinery was in order, and that the vessel had the right of way over any other through the draw. It was, for some considerable time, wholly reasonable for the pilot to expect momentarily that the green signal would appear, for which the contention that it was shown at 4:17 is the strongest justification. The megaphone was used in fact to aid the vessel in moving through what was thought to be fog; but in conjunction with the single red light and the absence of the double red lights, it added to the confusion and led to dropping the anchor. Anticipating the green light, anxious to avoid an unnecessary delay in anchoring, being warranted in his expectation and approaching the indefinite point of a safe distance, how can it be said that what he did was so gross or reckless as no prudent pilot could have been led into and as outside and beyond any reasonable or probable consequence of negligence in the drawbridge signalling? The bridge tenders must, in such circumstances, contemplate that their neglect in giving the green signal may draw a vessel too far down the harbour and into hazardous waters, and that is what happened. The actual navigation was thus the product of the joint negligence of the persons operating the signals on the drawbridge and of those in charge of the vessel: *Brown* v. *B. & F. Theatres* (1).

In its statutory assumption of the direction of navigation through the drawbridge, the Commission has undertaken to operate the signals with the customary care and skill where interests are committed to reliance on the discharge of this sort of duty by others. Since it had full knowledge of the existence and the placement of the pipes, that

(1) [1947] S.C.R. 484.

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responsibility would extend to foreseeing that negligence in signalling might in the ordinary course of things bring about emergency action in the channel by which property of various kinds might be affected. There was, thus, a direct obligation on the Commission toward the Water District to avoid bringing that situation about negligently: *The "Mystery"* (1).

For the first time in the proceedings, the objection is taken, on behalf of the Harbour Commission, that the Admiralty jurisdiction of the Court does not permit the joinder of the Commission, and it calls for some consideration. It is based on the fact that the claim is for damage to property on land within the body of a county and is by and against a person other than the owner of a ship. In *The Queen* v. *Judge of City of London Court* (2), it was held by the Court of Appeal that the Admiralty Court had no jurisdiction to entertain an action in personam against a pilot in respect of a collision on the high seas caused by his negligence. That decision limited the causes *in personam* that could be brought under the statutory jurisdiction which included damage done "by a ship". It followed the ruling of Sir Robert Phillimore in *The "Alexandria"* (3), which, likewise, was a proceeding against a pilot for damage done through his negligence on the Mersey. In the course of his reasons, however, Sir Robert stated that if the question had been *res integra,* he should have been of opinion that under the provisions of sections 7 and 35 of 24 Vic. c. 10, the Court had jurisdiction. Section 7 imports causes for damage done "by a ship" and 35 provides for actions in personam as well as in rem. On the other hand, in *The "Zeta"* (4), the House of Lords seems to have expressed the view that a ship is entitled to bring action in Admiralty against a Dock Authority for damage done "to a ship" through collision with a pier caused by the negligence of the Authority; and in *The "Swift"* (5), the owners of oyster beds were upheld in an action against a ship for damage done their property by negligent grounding. Whether a distinction between the

(1) [1902] P. 115.
(2) (1892) L.R. 1 Q.B. 273.
(3) (1872) L.R. 3 A. & E. 574.
(4) [1893] A.C. 468.
(5) [1901] P. 168.

jurisdiction in cases of damage "by a ship" and "to a ship" can be drawn from the statute remains, apparently, undecided.

As the jurisdiction of the Exchequer Court for this purpose is the Admiralty jurisdiction of the High Court in England, if the action had been brought against the Harbour Commission as for an individual tort, the point taken might be formidable; but the cause of action alleged is, strictly, one against joint tort feasors: *The "Koursk"* (1); i.e. both the vessel and the Commission have concerted in directing and controlling the movement of the vessel down the harbour: it was a single act with joint participants. In such a case, a judgment against one merges the cause of action and would be an answer to an action brought against the other in another court.

The Water Authority is entitled to assert a remedy in Admiralty both against the vessel, *in rem,* and against the ship owners, *in personam*; and the law administered would be Admiralty law. The limitation of the scope of proceedings so as to deny the joinder of the Harbour Commission would deprive the Authority of one of those remedies if it desired also to pursue its claim against the Commission. Every consideration of convenience and justice would seem to require that such a single cause of action be dealt with under a single field of law and in a single proceeding in which the claimant may prosecute all remedies to which he is entitled; any other course would defeat, so far, the purpose of the statute. The claim is for damage done "by a ship"; the remedies *in personam* are against persons responsible for the act of the ship; and I interpret the language of the statute to permit a joinder in an action properly brought against one party of other participants in the joint wrong.

It seems to have been assumed by counsel that the provincial *Contributory Negligence Act* applied as between the respondents, but I am unable to agree that it does. There is here a special situation. By the *National Harbours Act* the Commission is declared for all purposes of its administration of this harbour to be the agent of the Crown. Although that *Act* creates a duty on the Commission, by

(1) [1924] P. 140.

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its commitment, in such a case, to the Admiralty Court, the law of that Court becomes applicable; and from the judgment of the House of Lords in *The "Devonshire"* (1) the maritime law, in this respect, is seen to be the same as the common law. It follows that there can be no contribution between the defendants.

It is contended finally by the Commission that the Water District is unable to assert such a claim by reason of an undertaking contained in the licence under which the pipes were laid. It was given by the City of Vancouver, and is recited in Order-in-Council P.C. 319 of 1926 as follows:

> It is distinctly understood and agreed that nothing herein contained shall operate to render His Majesty or his officers, servants or workmen liable directly or indirectly for damage which may be done from any cause to the said water mains.

What is "herein contained" is a licence to install the pipes on the harbour bed; what is excluded is the existence of any duty arising from the status of licensor. How that relation in any way tends or operates to render the Commission, representing His Majesty, liable for the damage caused by negligence in the operation of the drawbridge I am quite unable to see. The language is not at all apt to meet the case before us. If it had been intended that under no circumstances connected with the administration of the harbour should His Majesty be liable directly or indirectly for damage to the water mains, it would have been easy to provide so. But whatever was in the mind of the draftsman, the language he has used makes it impossible to extend it to the facts here.

I would, therefore, dismiss the appeal of *"Sparrow's Point"* with costs to the Water District and allow the appeal of the Water District with costs against the Harbour Commission in both Courts.

LOCKE J. (dissenting in part):—The occurrences which gave rise to the present proceedings are sufficiently stated in the judgment (2) from which this appeal is taken. At the outset the appellant ship is faced with the finding of fact by the learned trial judge that upon hearing the signal of the vessel at 4.14 a.m. when she was off Berry's

(1) [1912] A.C. 634.

(2) [1950] Ex. C.R. 279.

Point, the operators of the bridge turned on one red light, the required signal to indicate that the whistle of the vessel had been heard, proceeded to raise the span to the height of 120 ft. and then extinguished the red light and turned on the green light to indicate to the approaching vessel that the span was open, and that it was due to the superstructure of the span being obscured from the vessel's view by fog or overcast that the signal was not visible from the vessel. The appellant, Greater Vancouver Water District, which had succeeded against the ship at the hearing but failed against the Harbours Board, while not in the first instance appealing against that portion of the judgment later obtained leave to appeal, is faced with the same difficulty. Unless this finding of fact is to be reversed in this Court, it appears to me to be decisive against both of the appellants.

The evidence of Clohosey, an employee of the defendant Harbours Board and the operator in charge of the bridge on the night in question, and of Robert Brassell, his assistant, is to the effect that the signal lights were examined by them when they came on duty about midnight of December 25 and found to be in order: that they had received a telephone message about 3 o'clock on the following morning informing them that the *Sparrows Point* was coming out on the tide and so were on the lookout for her and that when they heard three blasts of her whistle, the regular signal of an approaching vessel requiring the span to be opened, the single red light was turned on and the traffic gates of the bridge lowered, the span was at once raised to its full height of 120 feet and the red light then extinguished and the green light, which would indicate to the vessel that the span was raised, turned on and remained on until the time when the ship, after dropping her anchor and causing the damage complained of, passed through the bridge. Both say that when the ship's whistle was first given the visibility was fair but that when the span was raised, carrying with it the machinery house in which they carried on their operations, they found themselves in a dense fog. Being then unable to see the approaching vessel and apparently assuming that the green light situate near the upper part of the span would not be visible to the vessel,

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they attempted by using a loud speaker to give information to the ship that the span was open. According to the pilot, the master and other ship's officers, however, the green light was not seen until after the anchor had been dropped, their inability to discern it being caused, if the story of Clohosey and Brassell be true, by the fog at the upper level. The bridge operator was required by his instructions to keep a record of occurrences on the bridge, which Clohosey referred to as a log, and the original of this document in his handwriting shows the ship's signal heard at 4.14 a.m. and the span raised at 4.17 a.m., entries which he said he made at the time of these occurrences. In Clohosey's report of the accident to his employer, written in pencil on a form apparently provided for such occurrences, which was put in evidence by the appellant ship with its *de bene esse* evidence, the following appears:

> At 04·14 I received a signal for the span to raise. I went outside and saw a ship in the distance coming from east. I answered signal at once and began to operate bridge. When bridge was open or raised I gave signal green light at 04·17 but could not see ship as fog has come down. The ship began signalling for the span to open. I began using the loud speaker and did not see ship until she was about the pipe line. I heard her dropping anchor and assistant who was listening heard some one say "there is the bridge." Passed through at 04·35 and changed course to port about 4 when signalled down to almost zero and about 2 when vessel passed bridge.
>
> At the time the *Sparrows Point* signalled for the span the visibility was about 4. Could see ship. At the time the span was raised I could not see ship. Fog set in between 04·14 04·17. Vis. bad or about 100 yards. About 2 minutes before she came through around 04·33. I was talking on loud speaker before anchor dropped. Vessel continued to signal for bridge after signal span open given. I saw the vessel when on this side of pipe line no one spoke from the vessel.

In the appropriate places on the form under the heading "Weather" there appears the words "foggy, spotty" and under the heading "Visibility" "poor, Fog, about 4 when signalled down to almost zero and about 2 when vessel passed bridge."

This evidence was flatly contradicted by that of a number of witnesses including the pilot. According to the latter, the vessel left the British American Oil dock in Burrard Inlet at 3.02 a.m. intending to proceed through the second Narrows Bridge to Coal Harbour. When they reached a position opposite Roche's Point they ran unexpectedly into a bank of fog, whereupon they took the way

off the ship and stopped: after a few minutes the fog bank clearing they proceeded towards Berry's Point and shortly after 4 o'clock, when opposite that place, blew three long blasts of the whistle for the bridge. This witness said that the red light then appeared and continued plainly visible until the ship reached a point something more than 400 yards to the east of the span when, the green light not being shown in spite of their having given repeated blasts from the whistle, it was necessary for the safety of the ship to drop the anchor. This evidence was supported by that of McElroy, the quartermaster of the vessel who was at the wheel, and by Captain Nilsen who was on the bridge, Ralph Kuhn, chief officer who was on the foc'scle head, together with the boatswain and two lookout men and by Arthur Costan, the third mate who was also upon the bridge. Of these witnesses, Nilsen, Kuhn and Costan gave their evidence *de bene esse*: McElroy, as well as the pilot, appeared at the trial. The boatswain and the two lookout men who had been in the foc'scle with Kuhn were not called. In addition to these witnesses who had been on the ship, evidence was given by some residents living on the south shore of the inlet shortly to the east of the bridge and by others who lived on the north side, who said that the visibility towards the bridge at or about the time of these occurrences was good: some of them had heard a voice speaking through the loud speaker but they were definite that it did not say that the bridge or the span was open, and several of the witnesses from the ship gave evidence as to this to the like effect.

The learned trial judge, however, believed Clohosey and Brassell. In his reasons delivered at the conclusion of the trial he said that he could see no ground for doubting the accuracy of their evidence and accepted it, that the atmospheric conditions that night were peculiar, there being fog banks lying around, and that, in his opinion, at a higher level at the bridge at the relevant time the fog was denser and heavier than elsewhere. As to the pilot whose honesty he clearly accepted and whom he described as a man of very great experience, he said that his evidence had been given in such a satisfactory and seamanlike fashion as to win his admiration, but that he thought he was mistaken

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in thinking that he saw the red light up to and as late as the moment when he ordered that the anchor be dropped. In further reasons delivered at a later date he again stated that he accepted the evidence of the bridge officers "who in the course of their duties noted in their log book what occurred" and found that three minutes after hearing the ship's signal they had raised the span to its full elevation of 120 feet, the red light had been succeeded by the green light and all was in order for the ship to pass through, but that the dense fog on the upper level had prevented those on the ship from seeing the green light and that there was no fault on the part of the operators. As to the other witnesses from the ship who had testified that they continued to see the red light until the anchor was dropped, he said that he was satisfied that they were mistaken and that since both the red and green lights rose with the span into the fog above they could see neither.

While the witnesses who were on the ship may have been mistaken in thinking that they had seen a red light continuously from the time they passed Berry's Point until the time of anchoring, conceivably confusing other lights visible in the harbour with that of the bridge, there can be no mistake on the part of Clohosey and Brassell as to the principal matters sworn to by them: these were either true or false and if false the entries in the log and the accident report concoctions of Clohosey. If their stories were untrue, there can be no doubt they were deliberately so. The log, so-called, maintained on the bridge bears as its first entry on December 26, 1946, the information as to the time of the raising of the span for the *Sparrows Point*, an entry which is signed by Clohosey in the appropriate place and this is followed by entries made by other employees engaged on the bridge recording other occurrences later on the same day and bears on its face nothing to indicate that it is not what it purports to be, a record made at the time. It is also the undoubted fact, as shown by the evidence of the witnesses for the ship, that there had been patches of fog in the harbour that morning: the *Sparrows Point* had itself been halted by such a fog near Roche's Point and when she passed through the bridge at 4.35 a.m. she again encountered fog in the anchorage to the west of the bridge, and that there was fog at the

upper level to which the span was raised has been accepted as a fact by the learned trial judge. In *Arpin* v. *The Queen* (1), this Court said that where a judgment appealed from is founded wholly upon questions of fact it would not reverse it unless convinced beyond all reasonable doubt that it was clearly erroneous. The judgment of Taschereau J. in *North British and Mercantile Insurance Company* v. *Tourville* (2), where concurrent findings of fact were reversed, made it clear that it was not intended to depart from the rule as thus stated. In *Granger* v. *Brydon-Jack* (3), Anglin J. adopting the statement of Viscount Haldane in *Nocton* v. *Ashburton* (4), said that it was, in his opinion, a rash proceeding on the part of a court of appeal to reverse a judgment on an issue of pure fact, the finding of a trial judge necessarily and expressly made to depend upon the credit to be given to the conflicting evidence of the parties to the transaction whom he saw and heard testify. In *Hontestroom* v. *Sagaporack* (5), Lord Sumner said in part that not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge and unless it could be shown that he had failed to use or had palpably misused his advantage the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own views of the probabilities of the case. In *Powell* v. *Streatham* (6), Lord Wright in referring to what had been said by Lord Sumner and noting that it was in an Admiralty appeal said (p. 265) that, in his opinion, the same principles applied in ordinary common law cases and that two principles were beyond controversy: first, that in an appeal from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen the court must, in order to reverse it, not merely entertain doubts whether the decision below was right but be convinced that it was wrong and that the court of appeal had no right to ignore what facts the judge had found on his impression of the credibility of the wit-

(1) (1888) 14 Can. S.C.R. 736.
(2) (1895) 25 Can. S.C.R. 177 at 193.
(3) (1919) 58 Can. S.C.R. 491 at 499.
(4) [1914] A.C. 932 at 945.
(5) [1927] A.C. 37 at 47.
(6) [1935] A.C. 243.

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nesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing. The subject has been discussed at further length by Lord Greene, M.R. in *Yuill* v. *Yuill* (1), and by Viscount Simon in *Watt* v. *Thomas* (2).

I think the present case was one where to see the witnesses Clohosey and Brassell and their demeanour as they gave evidence was of the utmost importance in determining whether they were telling the truth. Both men were aware that their statements had been flatly contradicted by the witnesses whose evidence had been taken *de bene esse* and by the pilot and others, and were cross-examined at length by able and experienced counsel. The learned trial judge has had the advantage which I have not of seeing these men and closely observing their bearing in the box and has come to the conclusion that their evidence is the truth. I can see no justification for interfering with that finding.

I respectfully agree with the further conclusion of the trial judge that for the ship to approach under the existing circumstances to a distance of not more than 400 or 500 yards from the bridge without having seen the green signal, thus placing herself in a position of jeopardy where it was apparently necessary for her own safety to drop the anchor, was a negligent act. The location of the water mains in the bed of the harbour at the place in question is clearly shown on the marine maps and their presence and approximate location were known both to the pilot and the master. Had those in charge of the ship, when they could not see the green light, stood off at a distance of 600 yards or more to the east of the bridge, anchoring if necessary, no damage could have resulted. It was the duty of the ship in these circumstances to refrain from damaging the mains by a negligent act (*Sub-Marine Telegraph Company* v. *Dickson* (3), per Willes J. at 779). Other considerations would, in my opinion, apply if, by way of illustration, a storm arose suddenly making it necessary in the ordinary course of navigation to drop the anchor to prevent the destruction of the ship, or if such a step were rendered necessary by some other force majeure

(1) [1945] 1 All. E.R. 183 at 188, 190.

(2) [1947] 1 All. E.R. 583, 584.

(3) (1864) 15 C.B. (N.S.) 759.

not attributable to a voluntary act of those in charge of the vessel. Here, however, it was a direct result of what appears to me to be the failure of those in charge to exercise reasonable care in the circumstances which led them to drop the anchor and damage the property of the Water District. I am further of the opinion that a claim founded upon negligence is not affected either by the terms of the undertaking entered into by the predecessor in interest of the Water District or of the Orders-in-Council which authorized the works.

The appeal of the appellant ship should be dismissed and since, in my opinion, the finding of fact at the trial that the green light was shown under the circumstances stated by Clohosey and Brassell should not be disturbed, I would dismiss the appeal of the Water District. The respondents should have their costs of the appeal by the appellant ship and the respondent Harbours Board its costs as against the respondent Water District of the appeal of the latter from the judgment at the trial.

Appeal of the ship dismissed with costs; and appeal of Water District allowed in part with costs.

Solicitor for the appellant: *D. S. Montgomery.*

Solicitor for the respondent Water District: *Douglas McK. Brown.*

Solicitor for the respondent Harbours Board: *D. M. Owen.*